

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTONROBERT ALBERS and CATHERINE
ALBERS

NO. CV-09-5058-EFS

Plaintiffs,

**ORDER DENYING AND DENYING AS
MOOT IN PART DEFENDANT'S
MOTION TO DISMISS**

v.

NATIONSTAR MORTGAGE LLC,

Defendant.

Before the Court, without oral argument, is Defendant Nationstar Mortgage, Inc.'s ("Nationstar") Motion to Dismiss (Ct. Rec. [22](#)), which seeks dismissal of the Complaint under Federal Rule of Civil Procedure 12(b)(6) and (c). Plaintiffs Robert and Catherine Albers oppose the motion as it relates to the claims asserted by Plaintiffs. For the reasons stated below, the Court denies and denies as moot Nationstar's motion and dismisses this action.

A. Background¹

Plaintiffs borrowed money and used their home as collateral. The lender agreed to impound amounts for property taxes and hazard insurance.

¹ The "background" section is based on the Complaint's factual allegations. (ECF No. 1); see *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

1 During 2008, GMAC Mortgage, LLC ("GMAC") serviced Plaintiffs' loan,
2 including managing the "impound account" from which GMAC paid Plaintiffs'
3 property taxes and hazard insurance. GMAC, however, overpaid the county
4 property taxes owed by Plaintiffs. Following this overpayment, GMAC
5 attempted to collect additional funds from Plaintiffs. Plaintiffs
6 repeatedly informed GMAC that it overpaid the property taxes. GMAC,
7 however, refused to correct its accounting and instead began diverting
8 Plaintiffs' timely principal and interest payments to the impound
9 account. GMAC then alleged that Plaintiffs' principal and interest
10 payments were in default.

11 Nationstar then began servicing the loan and likewise alleged that
12 Plaintiffs' loan was in default. Nationstar repeatedly threatened
13 foreclosure.

14 On July 14, 2009, Plaintiffs filed the Complaint, alleging 1)
15 Nationstar violated the Fair Debt Collections Practices Act (FDCPA), 15
16 U.S.C. § 1692 *et seq.*, 2) GMAC violated the Real Estate Settlement
17 Procedures Act (RESPA), 12 U.S.C. § 2605, and 3) both Nationstar and GMAC
18 violated the Washington Consumer Protection Act (CPA), RCW 19.86 *et seq.*
19 GMAC answered on August 25, 2009 (ECF No. 5), and Nationstar answered on
20 April 26, 2010 (ECF No. 11).

21 On July 15, 2010, Plaintiffs and GMAC agreed to dismiss the claims
22 against GMAC. (ECF Nos. 15 & 16.) On August 24, 2010, a Scheduling
23 Order was entered setting trial on Plaintiffs' remaining claims against
24 Nationstar on July 11, 2011. (ECF No. 21.) Nationstar filed the instant
25 motion to dismiss on November 12, 2010. (ECF No. 22.)

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1 **B. Standard**

2 A Rule 12(b)(6) motion to dismiss may be filed post answer. Fed.
3 R. Civ. P. 12(h)(2). And because Nationstar's motion does not go to the
4 merits of the action but rather focuses on the Complaint's allegations,
5 this Rule 12(b)(6) motion is properly considered under Rule 12(c)
6 (judgment on the pleadings) and not Rule 56 (summary judgment).

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)
8 tests the legal sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d
9 729, 732 (9th Cir. 2001). A complaint may be dismissed for failure to
10 state a claim under Rule 12(b)(6) where the factual allegations do not
11 raise the right to relief above the speculative level. *Ashcroft v.*
12 *Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555
13 (2007). Conversely, a complaint may not be dismissed for failure to
14 state a claim where the allegations plausibly show that the pleader is
15 entitled to relief. *Twombly*, 550 U.S. at 555. In ruling on a motion
16 under Rule 12(b)(6), a court must construe the pleadings in the light
17 most favorable to the plaintiff and accept all material factual
18 allegations in the complaint, as well as any reasonable inferences drawn
19 therefrom. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003).

20 **C. Authority and Analysis**

21 Nationstar seeks dismissal of the wrongful-foreclosure, CPA,
22 intentional infliction of emotional distress, FDCPA, and RESPA claims.
23 Because the Complaint does not allege wrongful foreclosure, intentional
24 infliction of emotional distress, or RESPA claims against Nationstar, the
25 motion to dismiss is **denied as moot in part**. For the following reasons,
26

1 the Court denies Nationstar's motion to dismiss Plaintiffs' asserted CPA
2 and FDCPA claims.

3 1. FDCPA

4 The FDCPA prohibits "debt collectors" from engaging in the
5 enumerated unlawful debt collection practices, which includes "false,
6 deceptive or misleading representations." 15 U.S.C. §§ 1692a & 1692e.
7 Nationstar submits dismissal is appropriate because it is not a debt
8 collector. The Court disagrees based on the alleged facts.

9 A "debt collector" includes any person "who regularly collects or
10 attempts to collect, directly or indirectly, debts owed or due or
11 asserted to be owed or due another." *Id.* § 1692a(6). A "debt" is
12 defined as "any obligation or alleged obligation of a consumer to pay
13 money arising out of a transaction in which the money, property,
14 insurance, or services which are the subject of the transaction are
15 primarily for personal, family, or household purposes, whether or not
16 such obligation as been reduced to judgment." *Id.* § 1692a(5).

17 Defendant relies on *Hulse v. Ocwen Federal Bank, FSB*, 195 F. Supp.
18 2d 1188 (D. Or. 2002), to argue that the loan is not a debt for FDCPA
19 purposes. The district court in *Hulse* held that non-judicial foreclosure
20 actions are not a "debt" under the FDCPA because "[f]oreclosing on a
21 trust deed is distinct from the collection of the obligation to pay
22 money. . . . Payment of funds is not the object of the foreclosure
23 action. Rather, the lender is foreclosing its interest in the property."
24 *Id.* at 1204. *Hulse's* reasoning has been rejected by the Fifth and Fourth
25 Circuits. *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373, 378 (4th
26 Cir. 2006); *Kaltenbach v. Richards*, 464 F.3d 524, 528 (5th Cir. 2006).

1 Plus, other courts have not applied *Hulse's* reasoning if the defendant
2 engaged in conduct other than simply initiating non-judicial foreclosure
3 proceedings. See *Castrillo v. Am. Home Mortg. Serv., Inc.*, 670 F. Supp.
4 2d 516, 525 (E.D. La. 2009) (discussing case law).

5 The Court likewise does not adopt *Hulse's* reasoning. The Court
6 finds no reason to create a loophole in the FDCPA immunizing foreclosure
7 proceedings used to collect debt secured by a real property interest.
8 See *Wilson*, 443 F.3d at 376. Based on the Complaint's allegations that
9 Nationstar 1) began servicing Plaintiffs' loan after it was allegedly in
10 default, 2) maintained the position that Plaintiffs' loan was in default
11 notwithstanding Plaintiffs' continued tender of loan payments, and 3)
12 repeatedly threatened foreclosure, the Court finds Plaintiffs' alleged
13 sufficient facts to support their FDCPA claim.

14 2. CPA

15 To support their CPA claim, Plaintiffs must allege sufficient facts
16 to establish a:

17 (1) unfair or deceptive act or practice; (2) occurring in trade
18 or commerce; (3) public interest impact; (4) injury to
19 plaintiff in his or her business or property; [and] (5)
20 causation.

21 *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778,
22 780 (1986). Nationstar argues that Plaintiffs cannot establish an unfair
23 or deceptive act or any injury resulting therefrom. The Court disagrees.

24 As mentioned above, the Complaint alleges that Nationstar repeatedly
25 threatened to foreclose on the property notwithstanding Plaintiffs'
26 timely loan payments: this could constitute an unfair act that injured
Plaintiffs.

1 **D. Conclusion**

2 Accordingly, **IT IS HEREBY ORDERED:** Nationstar's Motion to Dismiss
3 (**Ct. Rec. 22**) is **DENIED AS MOOT** (wrongful foreclosure, intentional
4 infliction of emotional distress, and RESPA claims) **and DENIED** (FDCPA and
5 CPA claims) **IN PART**.

6 **IT IS SO ORDERED.** The District Court Executive is directed to enter
7 this Order and provide copies to counsel.

8 **DATED** this 3rd day of January 2011.

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10 S/ Edward F. Shea
11 EDWARD F. SHEA
United States District Judge

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